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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Petitioners,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RUSSELL N. LUPLOW
DAVID SAWYER
DAVID MACHNACKI
LAW OFFICES OF
RUSSELL N. LUPLOW
33 Bloomfield Hills Parkway
Suite 145
Bloomfield Hills, MI 48304

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Petitioners Central States, Southeast and Southwest Areas Pension Fund, et al.

* Counsel of Record

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I. THE COURT BELOW IS IN CONFLICT WITH OHER CIRCUITS IN ITS INTERPRETATION OF *U.S. v. KUBRICK*, 444 U.S. 111 (1979).

Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States") was injured when U.S. Bedding failed to pay its withdrawal liability, as required by 29 U.S.C. §§ 1381(a) and 1399(b); and since Central States knew that U.S. Bedding had not paid, a cause of action accrued against U.S. Bedding at that time pursuant to 29 U.S.C. § 1451(a). Respondents NAVCO and William Caldwell also failed to pay their withdrawal liabilities, so there was a cause of action against each of

them as well. The liability of each, however, is joint and several with U.S. Bedding; thus there were three causes of action to be discovered.[1] Since under the federal discovery rule a cause accrues for purposes of a statute of limitations when it is "discovered," there were potentially three separate statute of limitations periods depending on when each cause was discovered. *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1031 (5th Cir. 1984); *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985).

In their response Respondents, NAVCO and William Caldwell, imply that there is only a single cause of action for withdrawal liability no matter how many businesses in this "controlled group" are liable under the statute. Thus, according to the assumption, the cause of action would have accrued against all of them at once when U.S. Bedding failed to pay its liability. (Accrual would be automatic since Central States, having sent a demand for payment, would know that it had not been paid.) Thus, according to the Respondents (and the Seventh Circuit), it is not necessary for Central States to know of their existence or their relationship to U.S. Bedding for the statute to run (although, they would agree, it certainly is necessary for Central States to identify, find, and sue them (individually) to collect the liability). Apparently on the basis of this implied assumption by Respondents, they conclude that there is no conflict between the court below and other circuits because their concealment of their identities would be irrelevant if the running of the limitations period is triggered by U.S. Bedding alone.

The Second, Fifth and Sixth Circuits have held that where the identity of a defendant is concealed from the plaintiff, the cause of action may not accrue until the de-

[1] A cause of action actually arose against each trade or business under common control with U.S. Bedding, pursuant to 29 U.S.C. § 1301(b)(1), of which there are more than three; but three is enough to serve this argument.

fendant's identity is discovered.[2] The court below, by contrast, while noting that Defendants' identities were concealed from Ceneral States,[3] held that the concealment did not delay accrual of the causes of action against them. The Seventh Circuit believed, on policy grounds, that pension plans should be encouraged to sue more promptly by imposing a single statute of limitations to run concurrently against these companies as if they were one.[4] Whether right or not, the Seventh Circuit split from the Second, Fifth and Sixth Circuits in interpreting *U.S. v. Kubrick*, 444 U.S. 111 (1979), and no amount of gloss by Respondents can hide the departure.[5]

This Court should resolve the conflict because the statute (ERISA) requires consistent application to achieve Congress' desire for nationwide uniformity in pension law. In addition, unequal treatment of plans on a cir-

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[2] *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982); *Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983); *Diminnie v. United States*, 728 F.2d 301 (6th Cir. 1984).

[3] The court acknowledged that "silence [is] a mild form of concealment." Petition Appendix at 11a. Other courts of appeals have seen nothing "mild" about it. *IUE Pension Fund v. Barker & Williamson*, 788 F.2d 118, 128 (3rd Cir. 1986). Failure to disclose where there is a duty to disclose is not to be disregarded. *Northern California Retail Clerks Pension Fund v. Jumbo Markets*, 906 F.2d 1371 (9th Cir. 1990).

[4] The policy judgment is belied by 29 U.S.C. § 1451(f)(2), which demonstrates no congressional solicitude for fraud or concealment under the statute of limitations.

[5] For example, Respondents state without explanation that "this [case] is not like *Barrett*." Brief at 8, n.3. But in *Barrett*, 689 F.2d at 330, the Second Circuit remanded the case for a factual determination of whether the defendant was concealed and whether plaintiffs should have discovered the cause of action. In this case the Seventh Circuit deprived Central States of an opportunity to develop such a record. Likewise, because the district court ruled on a motion to dismiss, Central States had no opportunity to show the critical facts as required under *Diminnie*, 728 F.2d at 305. Rather than confront these cases, Respondents simply dimiss them.

cuit by circuit basis breeds litigation and forum shopping and leads to unwarranted increases in pension plan administrative costs, which are born by participants through lower benefits. Moreover, *Kubrick* is not a pension case and its principles span the gamut of federal civil litigation. A uniform federal rule on accrual of a cause of action is essential for orderly federal litigation.

II. RESPONDENTS FAIL TO ADDRESS QUESTION 2, THE ABSOLUTE ABSENCE OF RECORD SUPPORT FOR THE DECISION BELOW.

Respondents assert that Central States failed to plead facts showing due diligence and thus was not entitled to equitable tolling of the statute of limitations. Neither the district court nor the court of appeals made any such ruling or even addressed that question. The district court (Judge Grady) never examined the complaint for due diligence, nor considered equitable tolling, because the question was irrelevant to the legal ruling the district court made in dismissing the complaint.[6]

The court below might have caught this error and have remanded the case, but it made its own, separate error. It confused the two cases it had consolidated before it: one decided on summary judgment and the other (this one) on motion to dismiss. In the companion case the district court (Judge Plunkett) gave the plaintiff pension plan an opportunity to show diligence. When that plaintiff did not respond, the court granted summary judgment to the defendants. In this case, by contrast, the district

[6] The district court erroneously believed that the statute required that these companies be treatel literally as one employer so that knowledge of one constituted knowledge of all. The court of appeals did not address this point and ruled on other grounds. That the district court was wrong is demonstrated by the fact that a judgment against one controlled group member is not a basis to institute garnishment or other collection proceedings against the others. Indeed "joint and several" liability implies a separate cause of action against each.

court (Judge Grady), saw no need for a diligence determination and dismissed the case on other grounds. The Seventh Circuit, in effect, deferred to Judge Plunkett's ruling in affirming Judge Grady in the instant case.

On petition for rehearing the court below attempted to recover from this error by stating that Central States waived its equitable tolling argument by failing to present it on appeal. This is obviously incorrect (Petition at 9 and Appendix at 28a-32a) and is (properly) not defended by Respondents. Instead Respondents suggest that there were not ample facts in the record to support a due diligence argument. But of course there were no facts in the "record." [7] The district court did not permit development of a record, which is the whole point of Petitioners' Question 2. Respondents have simply not responded to Question 2.

Had the court below remanded this case for a determination of whether Central States was entitled to equitable tolling, it could have avoided the conflict it created between itself and the Second, Fifth and Sixth Circuits. By its error the court has unnecessarily placed not only pension plans like Central States, but all federal litigants in positions of uncertainty as to when a cause of action accrues under *Kubrick*. If Central States were not diligent, it might lose under either *Kubrick* or equitable tolling; but the court below should not have attempted to answer that question itself and especially without a record. Remand of this case now would remove the conflict and would allow the Seventh Circuit to consider *Kubrick* (the next time it may be presented) in a more appropriate case—one with a record.

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[7] Central States submitted an affidavit regarding the facts it would have shown had it been permitted to do so. The purpose of submitting the affidavit on petition for rehearing was not to make a record but only to show the court the kind of record a remand might produce.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RUSSELL N. LUPLOW
DAVID SAWYER
DAVID MACHNACKI
LAW OFFICES OF
RUSSELL N. LUPLOW
33 Bloomfield Hills Parkway
Suite 145
Bloomfield Hills, MI 48304

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Petitioners Central States, Southeast and Southwest Areas Pension Fund, et al.

* Counsel of Record

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